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In the Supreme Court of the United States

October Term, 1958

ROBERT LEE KORTE, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

October Term, 1958

No. 497

ROBERT LEE KORTE, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 15-22) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 1958. The petition for a writ of certiorari was filed on November 6, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was exempt from future military service because of a prior felony conviction for violating the Universal Military Training and Service Act.

STATUTES AND REGULATIONS INVOLVED

The Universal Military Training and Service Act, as amended, provides:

Section 6(m) (50 U.S.C. App. 456 (m)):

> No person shall be relieved from training and service under this title by reason of conviction of a criminal offense, except where the offense of which he has been convicted may be punished by death, or by imprisonment for a term exceeding one year.

Section 10(b)(7) (50 U.S.C. App. 460 (b)(7)):

> (b) The President is authorized—
>
> * * * *
>
> (7) to prescribe eligibility, rules, and regulations governing the parole for service in the armed forces, or for any other special service established pursuant to this title, of any person convicted of a violation of any of the provisions of this title;

Section 12(a) (50 U.S.C. App. 462(a)):

> (a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations

made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title, or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title, or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of

not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. * * *.

Selective Service Regulations (32 C.F.R. (1954 Rev.) Sec. 1622.14):

> Class I-O: *Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.* (a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.

Selective Service Regulations (32 C.F.R. (1954 Rev.) Sec. 1622.44):

> Class IV-F: *Physically, mentally, or morally unfit.* In Class IV-F shall be placed any registrant (a) who is found to be physically or mentally unfit for any service in the armed forces; (b) who, under the procedures and standards prescribed by the Secretary of Defense, is found to to be morally unacceptable for any service in the armed forces; (c) who has been convicted of a criminal offense which may be punished by death or by imprisonment for a term exceeding one year and who is not eligible for classification into a class available for service; or (d) who has been separated from the armed forces by

> discharge other than an honorable discharge or a discharge under honorable conditions, or an equivalent type of release from service, and for whom the local board has not received a statement from the armed forces that the registrant is morally acceptable notwithstanding such discharge or separation.

Department of the Army Special Regulations, approved 10 April 1953, SR615-180-1, par. 10d(1):

> A registrant who has been convicted by a civil court, or who has a record of adjudication adverse to him by a juvenile court, for any offense punishable by death or imprisonment for a term exceeding 1 year is morally unacceptable for service in the Armed Forces unless such disqualification is waived by the respective department * * *.

STATEMENT

In the United States District Court for the Northern District of California, petitioner was convicted by the court without a jury of a violation of the Universal Military Training and Service Act in that he failed to report for work of national importance. He was sentenced to nine months imprisonment (R. 3-7, 60). His conviction was affirmed on appeal (Pet. App. 15-22).

Petitioner's defense at the trial was that he should have been classified IV-F, unacceptable for service, because of his previous felony conviction for an earlier violation of the Universal Military Training and Service Act.

Petitioner had been classified in January 1952 (R. 11). In the form for persons claiming to be conscientious objectors, and in a subsequent personal interview (May 5, 1952), petitioner stated that he was a member of the Reserve Officers Training Corps, University of California, that he was ordained as a Jehovah Witness minister on May 4, 1952, that he had belonged to Jehovah's Witnesses about a year and that he was employed as a full time clerk at the Western Pacific Railroad, preaching only on Sundays (R. 12-13, 53). Petitioner was retained in Class I-A and ordered to report for induction on April 28, 1953 (R. 14). He refused to submit to induction, was convicted of a violation of the Universal Military Training and Service Act (R. 14-15, 40), and was sentenced to 18 months imprisonment (R. 15, 40).

In March, 1954, petitioner was released on parole after serving eight months of the 18-month sentence (R. 15, 40). He remained on parole until February, 1955, during which time he was classified IV-F (R. 15).

Thereafter, he was re-classified I-A (R. 16). A few days later he filed a conscientious objector form and additional letters and documents showing his ministerial activity (R. 16-19). After the local board retained petitioner in Class I-A, he appealed to the appeal board (R. 21), and the case was referred to the Department of Justice for a hearing (R. 21).

While his case was pending before the appeal board, petitioner was ordered to take a physical ex-

amination at which he was found acceptable. On November 21, 1955, the United States Army Induction Station requested the Adjutant General to determine petitioner's eligibility for induction in view of his criminal record. On December 14, 1955, the Induction Station Commander executed a certificate of acceptability certifying that petitioner was found fully acceptable (R. 21, 37-38, 46).

On February 29, 1956, the Department of Justice recommended to the appeal board that the petitioner be classified as a conscientious objector (R. 26). He was so classified on July 20, 1956. After he had refused to designate the type of civilian work he would prefer, he was ordered to report for assignment to the Los Angeles Department of Charities (R. 29-34). He failed to report to the local board or to Los Angeles and the present indictment followed (R. 34).

ARGUMENT

Section 6(m) of the Universal Military Training and Service Act (50 U.S.C. App. Sec. 456(m)) provides:

> No person shall be relieved from training and service under this title by reason of conviction of a criminal offense, except where the offense of which he has been convicted may be punished by death, or by imprisonment for a term exceeding one year.

Petitioner contends that because of his previous conviction of a violation of the Universal Military

Training and Service Act this section exempted him from "training and service," and that he was, as a matter of law, entitled to a IV-F classification (Pet. 9-14). From this premise he argues that, to the extent the regulations permit waiver of unacceptability and hence classification for induction or civilian service, they are unauthorized by statute.

Section 6(m) of the Act (50 U.S.C. App. Sec. 456(m)) does not, however, require that all persons convicted of a felony be relieved from military service. This section is merely permissive:—unless the prior conviction is for a felony the person cannot be relieved of service; if the prior conviction is for a felony the section does not provide that he *must* be relieved from service.

All the classes of citizens entitled to exemption from military service are set forth clearly, precisely and affirmatively in Section 6 and its various subsections. The status of a felon is mentioned in only one subsection, "m", where it is stated in the negative fashion set forth above. The history of the Universal Military Training and Service Act makes it clear that the thrust of this particular section was not to grant an exemption but to insure that persons convicted of minor criminal offenses (breach of the peace, *etc.*) would not be immune from military service. The predecessor statute, the Act of November 13, 1942, Section 4, 56 Stat. 1018, which added subsection j to Section 5 of the Selective Training and Service Act of 1940, read:

> (j) No individual who has been convicted of any crime which may not be punished by death or

> by imprisonment for a term exceeding one year shall, by reason solely of such conviction, be relieved from liability for training and service under this Act.

House Report No. 2574, 77th Congress, 2d Session, shows that the purpose of this section was to tap a source of manpower that had previously been kept closed. In the debates, Mr. May of the Committee on Military Affairs stated (Congressional Record, October 17, 1942, p. 8275):

> The committee wrote into the bill another section by way of amendment. I am sure every Member present knows of the practice and the rule in the War Department for some time that they would not induct into the service a man who had been convicted of a felony. That practice had gone even to the extent of not inducting men who had been convicted of misdemeanors; for instance, a man might be convicted under some provision of the national prohibition law, might be convicted of a breach of the peace, but such court conviction barred him from admission to the service. We have provided that no individual shall be relieved from liability for training and service under this act or held to be not acceptable to the land or naval forces for such training and service on the ground of his having been convicted of any crime which is not a felony at common law if the local board having jurisdiction determines that such individual notwithstanding such conviction is morally fit for service.

Although the wording of the present section is slightly different, the intent is the same, to make

certain that there shall be no exemption solely because of conviction of a minor offense. It does not mean that one convicted of a felony must be exempt.

The position that Section 6(m) permits but does not require exemption of a person convicted of a felony is strengthened by other sections of the Act. Section 10(b)(7) (50 U.S.C. App. Sec. 460(b)(7)) (*supra*, p. 2) authorizes the President to "prescribe eligibility, rules and regulations governing the parole for service in the armed forces, or for any other special service established pursuant to this title of any person convicted of a violation of any of the provisions of this title." A conviction for any of the provisions of the Act constitutes a felony (50 U.S.C. App. Sec. 462(a)). Therefore, if petitioner's contention that Section 6(m) is a mandatory exemption for felons is accepted, Section 10(b)(7) is in direct conflict with it because it authorizes the President to determine the eligibility for service of a felon. Certainly Congress intended that construction of the two sections that would permit both of them to stand. *United States* v. *Moore*, 95 U.S. 760. The only reasonable and logical answer is that Section 6(m) does not demand that all felons be exempt.

This problem has been considered without extended discussion by the United States Court of Appeals for the Eighth Circuit in *Doty* v. *United States*, 218 F. 2d 93. There the court rejected a convicted felon's contention that he was ineligible for military service because of such conviction, stating that Section 6(m) of the Act did not make the defendant ineligible for service and that his acceptance or re-

jection rested in the discretion of the draft board or the military authorities. See also *United States* v. *Bouziden*, 108 F. Supp. 395 (W.D. Okla.).

Pursuant to the President's express power to "delegate any authority vested in him" under the Act and to "provide for the subdelegation of any such authority" (Section 10(c) of the Act, 50 U.S.C. App. Sec. 460(c)), pertinent Selective Service Regulations and Department of the Army Special Regulations were promulgated. Paragraph 10d(1) of the Army Regulations states:

> A registrant who has been convicted by a civil court, or who has a record of adjudication adverse to him by a juvenile court, for any offense punishable by death or imprisonment for a term exceeding 1 year is morally unacceptable for service in the Armed Forces unless such disqualification is waived by the respective department. * * *

In the instant case this waiver was granted and petitioner was given a I-O classification (conscientious objector).

Section 1622.44 of the Selective Service Regulations (32 C.F.R. (1954 Rev.) Sec. 1622.44) stated that:

> In Class IV-F shall be placed any registrant * * * (b) who, under the procedures and standards prescribed by the Secretary of Defense, is found to be morally unacceptable for any service in the armed forces; (c) who has been convicted of a criminal offense which may be punished by death or by imprisonment for a term exceeding one year and who is not eligible for

classification into a class available for service

* * *

Thus, under this section a man convicted of a felony who has been granted a waiver of moral disqualification is to be classified as other registrants. Like others, only if he does not qualify for military service, for noncombatant military service, or for service as a civilian worker, is he placed in the IV-F classification.

It is apparent then that the appeal board did not, as petitioner contends, improperly fail to consider the IV-F classification. On the contrary, it followed the dictates of Section 1622.44 and placed petitioner in a class where his services might be utilized for civilian work contributing to the maintenance of the national health, safety, or interest (Selective Service Regulations, Section 1622.44).

CONCLUSION

The decision below is clearly correct, there is no conflict among the circuits and no occasion for further review by this Court. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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